IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 23RD JANUARY 2007 / 3RD MAGHA 1928

WP(C).No. 2128 of 2007(C)

OS.105/1997 of III ADDL.SUB COURT, KOZHIKODE

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PETITIONER:

C.P.INDIRA DEVI, W/O.P.K.NAIR,
RESIDING AT KARUVASSERI AMSOM DESOM,
KOZHIKODE TALUK.

BY ADV. SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

RESPONDENT:

T.V.NARAYANA PANICKER,
S/O.APPU NAIR, LAKSHMI SADANAM,
CHERUVANNUR, KOZHIKODE.

BY ADV. SRI.K.M.FIROZ
SRI.M.C.SEN (SR.)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF JUDGMENT OF HON'BLE HIGH COURT IN W.P.9C0448/06 DATED 4.8.06.

EXT.P2: TRUE COPY OF APPLICATION I.A.5871/06 IN O.S.105/97, SUB COURT, KOZHIKODE DATED 7.12.06.

EXT.P3: TRUE COPY OF OBJECTION FILED BY RESPONDENT IN I.A.5871/06 IN O.S.105/97.

EXT.P4: TRUE COPY OF ORDER IN I.A.5871/06 IN O.S.105/97 SUB COURT, KOZHIKODE.

/TRUE COPY/

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.2128 OF 2007

DATED THIS THE 23rd DAY OF JANUARY, 2007

JUDGMENT

Petitioner is defendant and respondent plaintiff in O.S.105/97 on the file of Sub Court, Kozhikode. Suit is filed for realisation of the amount allegedly due under a demand promissory note executed by petitioner. Petitioner in the written statement denied the execution of the promissory note. The suit happened to be dismissed for default on 11.10.1990. It was restored only on 14.12.2004. As per order in F.A.O.153/04 by this Court setting aside the order passed by the trial Court in I.A.1513/03. Petitioner thereafter filed I.A.5871/06, an application under Order XXVI Rule 10A of Code of Civil Procedure to forward the disputed promissory note with the document containing the admitted signature of petitioner. It was dismissed by learned Sub Judge under Ext.P4 order. This petition is filed under Article 227 of Constitution of India challenging Ext.P4 order.

2. Learned senior Counsel appearing for petitioner and respondent were heard.

3. Learned senior Counsel appearing for petitioner pointed out that petitioner raised a contention in the written statement that she

did not execute the promissory note and the signature in the disputed promissory note is not her signature and the question whether the signature seen in the promissory note is that of petitioner is a very relevant matter to be decided in the suit and though under Section 73 of Evidence Act, Court is competent to compare the signature, it is always helpful to the Court to have a report of an expert to decide that question and learned Sub Judge should not have dismissed the application.

4. Learned Senior Counsel appearing for respondent argued that in the original written statement petitioner raised a contention that the signature seen in the promissory note has no similarity with her signature and in the additional written statement, it was contended that on a careful perusal of the disputed promissory note, it is seen that there is a colourable imitation in writing in the name of petitioner and the writing is not her writing and the signature is in a similar fashion and petitioner being a house wife does not have a definite signature and she used to affix her signature on very rare occasions and there is a possibility that her signature used to be like that appearing in the document. Learned Counsel pointed out that petitioner has executed the vakalath and signed the written statement in different signatures and raised a contention originally in the written statement that there is no similarity and later changed the case in the additional written statement and in such circumstances, it is clear that there is no bonafides in the dispute on

the signature and therefore there is no reason to interfere with Ext.P4 order. Learned Counsel also argued that the opinion of expert on comparing the handwriting is not binding on the Court being only an opinion evidence and therefore learned Sub Judge rightly dismissed the application and there is no reason to interfere with Ext.P4 order in exercise of the extraordinary jurisdiction of this Court. Learned Senior Counsel finally submitted the the burden is on respondent to prove the execution of the promissory note and one of the attesting witnesses is no more and other witness is already aged 78 years and if evidence is not recorded immediately, it may not be possible for respondent to examine that witness also and the purpose is only to deny the opportunity to prove the case.

5. Under Section 73 of Indian Evidence Act, a Court is competent to compare the disputed signature with the admitted signature and enter a finding on the basis of comparison. Though the Court is said to be an expert of the experts, it is always prudent to get the opinion of an expert to arrive at that conclusion. The Apex Court in **State (Delhi Admn.) Vs. Pali Ram (AIR 1979 SC 14)**, which has been followed in **O. Bharathan Vs. K. Sudhakaran and another (AIR 1996 SC 1140)** reiterated the legal position. In such circumstances, learned Sub Judge should not have rejected the request to send the disputed promissory note, to get an opinion of the expert on the ground that the Court is competent to compare the signature.

6. Then the question is whether on the ground of delay, the application is to be rejected. As pointed out by learned Senior Counsel appearing for petitioner, though the suit was instituted in 1997, it was dismissed for default on 11.10.99 and was restored only on 14.12.2004. In such circumstances, on the ground of delay the petition should not have been rejected. But there is force in the submission of learned counsel appearing for respondent that by sending the document to an expert, respondent shall not denied an opportunity to prove the execution of the disputed document by the available attesting witness. But that could be avoided by directing the recording of evidence before forwarding the document to the expert. But in the interest of justice it is necessary to get an opinion of the expert to decide the question.

7. Writ Petition is disposed as follows:

Ext.P4 order is quashed. Learned Sub Judge is directed to send the disputed promissory note and the document produced by petitioner containing her signature and also any other document if any produced by plaintiff or the defendant containing the signature of defendant, to an expert at the expense of petitioner/defendant after recording the evidence of plaintiff and before recording of defence evidence. Sub Judge to dispose the suit as expeditiously as possible.

M.SASIDHARAN NAMBIAR,JUDGE

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